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Nos. 97-1943 and 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

KAREN SUTTON AND KIMBERLY HINTON,
Petitioners,

v.

UNITED AIRLINES, INC.,
Respondent.

VAUGHN L. MURPHY,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AIDS ACTION, *et al,* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

The *amici curiae* joining this brief are organizations that represent individuals with disabilities, including individuals with disabilities that are ameliorated or treated with mitigating measures such as medications. The *amici* share a commitment to eradicating the debilitating discrimination faced by persons with disabilities, and to ensuring equality and reasonable accommodation in the workplace and other settings covered by federal disability law. The *amici* have a strong interest in the effective implementation of the Americans with Disabilities Act ("ADA"), and bring a unique understanding of the purpose and role of laws barring disability-based discrimination. A full recitation of their interest appears in the Appendix.

The written consents of the parties to this brief have been lodged with the Clerk pursuant to Rule 37.2.[1]

ARGUMENT

In enacting the ADA, Congress found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). Congress further enunciated its sweeping purpose: "to provide a clear and comprehensive national mandate for the

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[1] No contributions were made to this brief by counsel for the parties. No monetary contributions were made other than by *amici*. Rule 37.6.

elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

The analysis employed by the U.S. Court of Appeals for the Tenth Circuit in *Sutton*, and affirmed by that Court in *Murphy*, is contrary to this purpose.

I. THE DEFINITION OF DISABILITY UNDER THE ADA IS INTENTIONALLY BROAD TO ACHIEVE THE CIVIL RIGHTS PURPOSES OF THE LAW.

The ADA was intended to cover a broad range of disabilities, and to ensure that persons with disabilities are full and equal members of our society. To achieve this goal, Congress fashioned a statute designed to protect not only those persons who have impairments that give rise to specific physical and mental limitations, but also those who have experienced such limitations in the past or who are regarded as having a disability by others.

Congress recognized that the irrational fears and misperceptions about disability can be as debilitating as the impairments themselves.[2] Thus, included within the broad class of persons protected by the Act are those who are limited and discriminated against because of the "prejudice, stereotype, or unfounded fear" of others. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

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[2] 136 Cong Rec S 7422, *S7442 (June 6, 1990) (Statement of Sen. Harkin) ("[T]he fear of epilepsy was once so great that people with this disease were believed to be possessed by the devil and were shut out of schools and the workforce. Even cancer was once thought to be contagious and resulted in discrimination.. For people with disabilities, including those with HIV disease and AIDS, the ADA offers promise that they will no longer be shunned and isolated because of the ignorance of others.").

Accordingly, Congress adopted the broad and longstanding definition included in the Rehabilitation Act of 1973, 29 U.S.C. § 794, defining disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). As this Court noted in *Bragdon v. Abbott*, this definition is drawn "almost verbatim" from the Rehabilitation Act's broad definition. 524 U.S. 624, 118 S. Ct. 2196, 2202 (1998); *see also Arline*, 480 U.S. at 285 ("the definition of 'handicapped individual' is broad"). In so adopting, Congress intended that the ADA's protections cover a wide range of types and levels of disabilities.

II. IN ENACTING THE ADA, CONGRESS ADOPTED THE COVERAGE OF THE REHABILITATION ACT AS A MINIMUM STANDARD.

Congress is presumed to know the state of the law when it passes legislation, and its use of terms which have been previously construed indicates an intent to ratify such interpretations. *Bragdon*, 118 S. Ct. at 2208. Accordingly, this Court should assume that Congress intended to codify the law of Section 504 as it existed in 1990 as the minimum level of coverage under the ADA.[3] Indeed, Section 501(a) of the ADA was adopted to ensure

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[3] In fact, the ADA was enacted to broaden civil rights protections, beyond the scope of Section 504. *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995) (analyzing ADA's legislative history).

that the courts would *not* construe the ADA to afford less protection than Section 504 of the Rehabilitation Act.[4]

A. Section 504 Case Law Protected Individuals With Mitigated Disabilities.

Section 504 case law existing at the time of the ADA's passage extended civil rights protections to numerous groups of persons with disabilities which were either wholly or partially mitigated through treatment and other measures. For example, insulin-controlled diabetes was held to be covered under Section 504 prior to the passage of the ADA.[5] Similarly, epilepsy and seizure disorders were repeatedly deemed disabilities.[6] Courts also recognized that diseases such as HIV, even in their

[4] "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [citation omitted] or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

[5] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619, 621 (9th Cir. 1982); *Davis v. Meese*, 692 F. Supp. 505, 513, 517 (E.D. Pa. 1988), *aff'd.* 865 F.2d 592 (3d Cir. 1989) (table) ("Some insulin-dependent diabetics never experience a severe hypoglycemic occurrence, and are able to control their blood sugar levels at nearly normal levels throughout their working careers. . . . [A]n insulin dependent diabetic is clearly a 'handicapped person.'").

[6] *Reynolds v. Brock*, 815 F.2d 571, 573-74 (9th Cir. 1987) (plaintiff with infrequent seizures could be disabled because persons with epilepsy face policies restricting their employment opportunities); *Mantolete v. Bolger*, 767 F.2d 1416, 1420, 1424 (9th Cir. 1985) (person with condition under "complete control" was disabled and potentially entitled to accommodation); *Akers v. Bolton*, 531 F. Supp. 300, 315 (D. Kan. 1981) (Section 504 "doubtless encompasses the class of epileptic school children"); *Drennon v. Philadelphia General Hosp.*, 428 F. Supp. 809, 815 (E.D. Pa. 1977) ("That persons with epilepsy are considered handicapped is too self-evident to be contested.").

"asymptomatic" phases, may be disabilities.[6] Several of these decisions were cited by this Court in *Bragdon* as having correctly construed the definition of disability under Section 504. 118 S. Ct. at 2208.

The pre-ADA courts also held that recovered alcoholics and drug users are protected by Section 504.[7] Indeed, the issue was considered so well settled that this Court simply assumed that recovered alcoholics are disabled in *Traynor v. Turnage*. 485 U.S. 535, 548-49 (1988). The courts recognized that Congress intended that coverage would enable persons with drug and alcohol addictions to engage in treatment programs.[8]

By incorporating into the ADA virtually the same definition of disability contained in Section 504, Congress adopted and ratified the case law interpreting the "plain language" of that definition.

[6] *Doe v. Garrett*, 903 F.2d 1455, 1457, 1459 (11th Cir. 1990) *cert. denied*, 484 U.S. 849 (1987) ("[I]t is well established that infection with AIDS constitutes a handicap."); *Ray v. School Dist. of DeSoto County*, 666 F. Supp. 1524, 1527-28, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified School Dist.*, 662 F. Supp. 376, 383 (C.D. Cal. 1987); *see also Robertson v. Granite City Com. Unit School Dist. 9*, 684 F.Supp. 1002, 1007 (S.D. Ill. 1988).

[7] *See, e.g., Tinch v. Walters*, 765 F.2d 599, 603 (6th Cir. 1985); *Sullivan v. City of Pittsburgh, Pa.*, 811 F.2d 171, 182 (3d Cir. 1987), *cert. denied*, 484 U.S. 849 (1987); *Wallace v. Veterans Administration*, 683 F.Supp. 758, 761 (D. Kan. 1988); *Anderson v. University of Wisconsin*, 665 F.Supp. 1372, 1391 (W.D. Wis. 1987), *aff'd*, 841 F.2d 737, 740 (7th Cir. 1988); *Traynor v. Walters*, 606 F.Supp. 391, 399-400 (S.D.N.Y. 1985) (alcoholic who had been sober 10 years was "handicapped individual").

[8] *See, e.g., Davis v. Bucher*, 451 F.Supp. 791, 796 (E.D. Pa. 1978); *Burka v. New York City Transit Authority*, 680 F.Supp. 590, 600 (S.D.N.Y. 1988).

B. Section 504 Regulations Confirm a Broad Definition of Disability.

The original Section 504 regulations, promulgated by the Department of Health, Education and Welfare in 1977, further indicate that many disabilities which can be mitigated through treatment are covered. In *Bragdon*, this Court held that "the ADA [must] . . . grant at least as much protection as provided by the regulations implementing the Rehabilitation Act." 118 S. Ct. at 2202 (citing Section 501(a)).[9]

For example, the regulations in place since the time the ADA was enacted define "physical or mental impairment" to include numerous medical conditions which may be controlled or mitigated through treatment, including emotional or psychological disorders. 45 C.F.R. § 84.3(j)(2)(i). Further, the commentary to the regulations provides a non-exclusive list of additional examples, including hearing impairments, epilepsy, multiple sclerosis, cancer, heart disease, diabetes, drug addiction, and alcoholism. 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. Pt. 84, App. A, p. 334 (1998).

Perhaps most tellingly, the commentary notes that federal disability nondiscrimination law should not be limited to "traditional disabilities," nor to "severe disabilities." *Id.* at 352; *see also Arline*, 480 U.S. at 280 n.5 (broad definition not limited to "traditional handicaps"). This same perspective must be brought to the ADA's definition of disability.

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[9] This Court has repeatedly held that such regulations are entitled to special deference because they were developed with the oversight and approval of Congress. *Arline*, 480 U.S. at 279-80.

III. CONGRESS STATED THAT MITIGATING MEASURES ARE NOT TO BE CONSIDERED IN DETERMINATING WHETHER AN INDIVIDUAL IS DISABLED.

The starting point for statutory analysis is the plain language of the statute itself. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). The plain language of the ADA protects an individual with a disability, defined as "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. § 12102(2). However, the statute -- which does not define "impairment," "substantially limits," or "major life activities" -- does not specify whether a court should consider medications, prosthetic devices, or other treatments in determining whether a person has a substantially limiting impairment.

Where the text of a statute is not unambiguously clear, this Court has looked to the statute's legislative history for guidance. *United States v. Dickerson*, 310 U.S. 554, 562 (1940). In enacting the ADA, the Congress issued extensive reports detailing its intent in adopting the Act's broad definition of "disability." On numerous occasions, Congress explicitly stated that mitigating measures are not to be considered in determining whether an individual has a disability covered by the Act:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as

> epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

House Comm. on Educ. & Labor, H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 52 (1990); *see also* House Comm. on the Judiciary, H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 28-29 (1990) ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."); Senate Comm. on Labor & Human Resources, S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989).

A. The Instruction of Congress to Disregard Mitigating Measures Is Consistent with its Intent to Protect Persons with Treatable Disabilities.

Although the ADA requires an individualized analysis to determine whether a particular impairment constitutes a covered disability, Congress expressly cited in the legislative history a number of exemplary conditions that could be protected under the Act's definition, including epilepsy, diabetes, mental health conditions, cancer, HIV/AIDS, alcoholism, and heart disease.[10]

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[10] S. Rep. No. 116 at 8, 22-24, 27, 31, 39-40, 62 (1989); H.R. Rep. No. 485(II) at 51-53, 57, 62, 72, 75, 79-80, 104; H.R. Rep. No. 485(III) at 28-29, 33, 42, 44-46, 50 (1990); *see also* 136 Cong Rec E 1913, *E1914 (June 13, 1990) (Statement of Rep. Hoyer) ("Examples of impairments that substantially limit major life activities are visual or hearing impairments, mobility impairments, cerebral palsy, epilepsy, HIV infection, mental retardation, chronic schizophrenia, or heart disease.").

For example, epilepsy is cited throughout the legislative history as an example of a covered disability.[11] The use of medication to mitigate the symptoms of epilepsy is expressly noted in the reports. H.R. Rep. No. 485(II) at 52; H.R. Rep. No. 485(III) at 28, 29. Indeed, in discussing the importance of protecting individuals with epilepsy, Representative Tony Coehlo noted that "today the overwhelming majority of people with epilepsy have their physical conditions under control through medication." 135 Cong. Rec. E 1575 (May 9, 1989).[12]

Similarly, diabetes, although frequently controlled with insulin, is cited as a covered disability.[13] Psychiatric conditions are also repeatedly cited.[14] As with epilepsy and diabetes, mental illnesses are often controlled by medications.[15]

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[11] S. Rep. No. 116 at 22, 31, 39, 62; H.R. Rep. No. 485(II) at 51, 52, 62, 72, 79, 80, 104; H.R. Rep. No. 485(III) at 28, 29, 33, 42, 50.

[12] *See also* 136 Cong Rec H 2421, *H2427 (May 17, 1990) (Statement of Rep. Hoyer) ("As we all know, Tony [Coehlo]'s original career plans were stalled because of discrimination against persons with epilepsy. In the end, this was a blessing to the Nation and this House, for he might not have ended up here. But no one in this Nation has proven more than Tony Coelho that someone with a disability can be one of the most able people our Nation has ever seen.").

[13] S. Rep. No. 116 at 22, 39; H.R. Rep. No. 485(II) at 51, 52, 72; H.R. Rep. No. 485(III) at 28, 42.

[14] H.R. Rep. No. 485(II) at 51, 57, 72, 79, 104; H.R. Rep. No. 485(III) at 28, 42, 45, 46; S. Rep. No. 116 at 22, 27, 39, 62 (1989).

[15] In defending the Act's protection of qualified individuals with mental health disabilities, Senator Harkin noted the role of medications: "I am sure there are plenty of manic-depressives in this country -- I know some. I have met some who are completely controlled under doctors' orders as long as they are on prescription drugs." 135 Cong Rec S 10765, *S10765, 10766 (Sept. 7, 1989).

In addition, HIV/AIDS is referenced in the reports.[16] As extensive floor discussion made clear, asymptomatic HIV was intended to be a covered disability.[17] The critical role of medications was noted.[18]

To consider mitigating measures in determining coverage under the Act would be directly contrary to the intent of Congress to protect persons with a wide range of episodic and treatable conditions.

B. Congress Expressed a Keen Interest in Promoting Treatment for Individuals with Disabilities.

The language of a statute is to be interpreted in light of the purposes Congress sought to serve. *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 36 (1983). Congress repeatedly expressed an interest in promoting health, treatment and

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[16] S. Rep. No. 116 at 19, 22 ("All persons with symptomatic or asymptomatic HIV infection should be clearly included," quoting Presidential Commission on the HIV Epidemic); H.R. Rep. No. 485(II) at 48, 51, 79; H.R. Rep. No. 485(III) at 28.

[17] *See* 135 Cong Rec S 10765, *10800 (Sept. 7, 1989) (Statement of Sen. Simon) ("[T]his bill will extend protection to people with AIDS and people infected with HIV, symptomatic and asymptomatic."); 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy) ("People with HIV disease are individuals who have any condition along the full spectrum of HIV infection -- asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. *These individuals are covered under the first prong of the definition of disability in the ADA* . . .") (emphasis added).

[18] 135 Cong Rec S 10765, *S10768 (Sept. 7, 1989) (Statement of Sen. Kennedy) ("The most recent Public Health Service report that was released 2 weeks ago, has demonstrated that AZT has had a positive impact on those that have tested positive but do not have the disease. . . . [W]e have pointed out very clearly, if you are asymptomatic and HIV positive, you are protected . . .").

recovery for individuals with disabilities through the implementation of the Act. Accordingly, the legislative history notes the importance of reasonable accommodations designed to serve this purpose.

For example, key committee reports note the importance of scheduling modifications benefiting individuals with chronic conditions:

> Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts.

H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

Similarly, sponsors of the Act noted the importance of anti-discrimination provisions and workplace accommodations enabling individuals with asymptomatic HIV to benefit from medications and other treatments:

> The reasonable accommodation provision of the bill will be particularly important in ensuring that people with HIV disease have the right to flexible work schedules and to time off to accommodate their treatment needs or their various disease-related conditions.[19]

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[19] 136 Cong Rec H 4614, *H4623, *H4626 (July 12, 1990) (Statements of Rep. Owens and Rep. Waxman); *see also* 136 Cong Rec S 9684, *S9696 (July 13, 1990) (Statement of Sen. Kennedy); 136 Cong Rec H 2421, *H2442 (May 17, 1990) (Statement of Rep. Weiss); 136 Cong Rec H 2599, *H2626 (May 22, 1990) (Statement of Rep.

Congress surely did not intend such modifications to be inversely tied to the success of an individual's treatment program.

Similarly, in lengthy floor debates on the Act's coverage of individuals with alcohol or drug addiction, several senators stressed the benefits of access to recovery programs, and expressly noted that the Act's protections extend to assist individuals in treatment:

> The act's protections extend to rehabilitated individuals who no longer use illegal drugs, but who continue to participate in treatment programs -- such as a methadone maintenance treatment program -- or continue to receive after-care counseling or participate in self-help groups. This reflects our recognition that these activities can be crucial to many individuals' ability to successfully sustain their recovery.[20]

In the words of Senator Moynihan, "To turn away from individuals who have recognized their addiction to drugs and alcohol and who have sought, successfully, treatment would indeed be a cruel hoax." 135 Cong Rec S 10765, *S10795.

Providing the health-promoting accommodations expressly cited by Congress would be meaningless were they were revoked once treatment became effective in controlling symptoms. Eliminating access to such accommodations "would indeed be a cruel hoax."

McDermott) (all noting importance of workplace accommodations to people with HIV).

[20] 135 Cong Rec S 10765, *S10774 (Sept. 7, 1989) (Statement of Sen. Kennedy).

IV. THE FEDERAL AGENCIES CHARGED WITH ENFORCING THE ADA HAVE STATED THAT MITIGATING MEASURES SHOULD NOT BE CONSIDERED IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

This Court has looked to administrative guidance issued by the Equal Employment Opportunity Commission (EEOC) and by the Department of Justice in construing the ADA. *See, e.g., Bragdon v. Abbott,* 118 S. Ct. at 2208-09. While such guidance are not controlling, they "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57, 65 (1986) (citations omitted), and are "entitled to deference." *Bragdon,* 118 S. Ct. at 2209.

As the federal agency charged with implementing Title I of the ADA, the EEOC has repeatedly stated that mitigating measures are not to be considered in evaluating whether an individual has a disability covered by the Act:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630, App., § 1630.2(j).

> [T]he extent to which the impairment limits the individual's major life activities should be assessed without regard to the availability of mitigating measures. Thus, an individual who has experienced a significant loss of hearing is substantially limited in his/her ability to hear, even if the use of a

> hearing aid would improve the individual's level of hearing. Similarly, individuals with impairments (such as epilepsy or diabetes) that substantially limit major life activities are individuals with disabilities, even if medication controls the effects of the impairments. Accordingly, an individual who received dialysis treatments for polycystic kidney disease had a substantially limiting impairment, even though the disease was adequately treated through dialysis.

EEOC Compliance Manual, EEOC Order No. 915.002, Section 902, *Definition of the Term "Disability,"* pp. 35-36 (Mar. 14, 1995) (citations omitted).[21] The Department of Justice, which is responsible for implementing Titles II and III of the ADA, has followed this view.[22] The Court should defer to these agencies.

V. THE MAJORITY OF FEDERAL COURTS HAVE DISREGARDED MITIGATING MEASURES IN EVALUATING WHETHER AN INDIVIDUAL HAS A DISABILITY.

Most federal Courts of Appeals have followed the rule stated in the legislative history and by the EEOC that mitigating measures should not be considered in determining whether an individual has a substantially limiting impairment. For example, the First and Seventh Circuits have held that individuals with diabetes controlled by insulin may be disabled under the Act. *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 866 (1st Cir. 1998)

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[21] *See also* EEOC Order No. 915.002, *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* 6-7 (Mar. 25, 1997).

[22] 28 C.F.R. pt. 35 app. A § 35.104 (Definitions).

(plaintiff's diabetes, in its untreated state, constituted disability); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626, 630 (7th Cir. 1998) (truck driver with insulin-dependent diabetes raised question of fact: "That he feels 'perfectly healthy' when he is taking insulin is utterly irrelevant to the assessment of disability for the purposes of the ADA.").[23] The First Circuit has also upheld a jury verdict in favor of a plaintiff with treated depression. *Criado v. I.B.M. Corp.*, 145 F.3d 437, 442-43 (1st Cir. 1998) ("That her depression had been adequately treated through therapy in the past and was expected to be adequatedly treated through therapy and medication in the future does not establish that she does not have a disability.").

Similarly, the Third Circuit found that a maintenance supervisor with epilepsy controlled by medication raised a question of fact as to whether he was disabled. *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-38 (3rd Cir. 1997); *see also Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778 (3rd Cir. 1998) (disregarding reasonable accommodations in finding sufficient evidence of substantial limitation in working). The Fifth Circuit found that an accountant with Adult Stills disease should be evaluated in his unmedicated state. *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 (5th Cir. 1998); *cf. Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993) (citing guidance

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[23] *See also Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (citing EEOC guidelines but finding insufficient evidence of substantially limiting impairment under that standard); *Coleman v. Keebler Company*, 997 F. Supp. 1102 (N.D. Ind. 1998) (same); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737, 746 (N.D. Ill. 1998) (insulin-dependent diabetes was disability); *Krocka v. Riegler*, 958 F. Supp. 1333, 1340-41 (N.D. Ill. 1997) (treated depression was disability); *Denson v. Village of Bridgeview*, 19 F. Supp. 2d 829, 834-35 (N.D. Ill. 1998) (uncorrected 20/400 vision constituted disability).

on insulin-dependent diabetes but finding plaintiff unqualified); *but see*, *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996) (implying disagreement with EEOC in *dicta*).

The Eighth Circut has followed the rule. *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 693 (1998) (police officer with monocular vision evaluated without regard to subconscious adjustments made by brain).[24] The Eleventh Circuit ruled that a comptroller with Graves Disease controlled by medication created a question of fact as to whether she had a disability. *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-23 (11th Cir. 1996). The Ninth Circuit has acknowledged the rule. *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1349 (1997)(citing mitigating measures guidance but finding no evidence that plaintiff's work activities were a form of treatment).[25]

Further, district courts in the Fourth, Tenth and D.C. Circuits have disregarded mitigating measures in evaluating whether an individual has a disability.[26]

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[24] *See also Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (applicant with vision impairment created issue of fact as to disability); *Smith v. Horton Industries, Inc.*, 17 F. Supp. 2d 1094 (D.S.D. 1998) (excluding consideration of prosthetic in deeming individual with one arm disabled).

[25] *See also Kirkingburg v. Albertson's, Inc.*, 143 F.3d 1228, 1221 (9th Cir. 1998) (subconscious adjustments to monocular vision did not render applicant nondisabled); *Coleman v. Southern Pacific Transp. Co*, 997 F. Supp. 1197, 1201 (D. Ariz. 1998) (excluding innate mitigating measures of the brain in finding monocular vision to be disability).

[26] *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 909 (E.D. Pa. 1997) (myopic applicants created question of fact); *Sarsycki v. U.P.S.*, 862 F. Supp. 336 (W.D. Okla. 1994) (judgment for plaintiff with controlled diabetes); *Fallacaro v. Richardson*, 965 F. Supp. 87 (D. D.C. 1997) (applicant who was legally blind without corrective lenses was disabled).

A minority of courts have rejected the Congressional and agency rule, contending that ignoring the effects of mitigating measures is inconsistent with the statutory language requiring a "substantial limitation" of a major life activity.[27] These courts disregard the unambiguous legislative history as to the meaning of this phrase, as well as significant Rehabilitation Act case law then in effect which interpreted similar language to protect individuals with treatable disabilities. Further, these courts incorrectly read the rule as eliminating the case-by-case analysis required by the Act. To the contrary, individuals must still demonstrate that their impairments, without mitigation, substantially limit one or more major life activities. Finally, these courts fail to consider the underlying purposes of the Act, which are inconsistent with rules that circumscribe protections against discrimination, or that deter access to effective treatment.

VI. EXCLUDING INDIVIDUALS WITH TREATABLE DISABILITIES FROM THE COVERAGE OF THE ADA IS CONTRARY TO ITS FUNDAMENTAL PURPOSES.

As a broad, remedial statute, the ADA must be liberally construed to effectuate its purposes. *Heilweil v. Mt.*

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[27] *Wilking v. County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) *aff'd*, 153 F.3d 869 (8th Cir. 1998); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F. Supp. 1081, 1088 (D. Kan. 1996); *Shulter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Tex. 1994); *see also Gilday v. Mecosta Cty.*, 124 F.3d 760 (6th Cir. 1997), at 767 (Kennedy, J., concurring in part and dissenting in part), at 768 (Guy, Jr., J., concurring in part and dissenting in part); *Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1080 (E.D. Okla. 1997).

Sinai Hosp., 32 F.3d 718, 722 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (describing "familiar canon of statutory construction"). The constructions employed by the courts below are contrary to the Act's remedial aims.

A. Excluding Individuals with Treatable Disabilities is Contrary to the Statute's Focus on Individuals Who are Able to Work Despite Their Disabilities.

As the Court noted in *Arline*, the ADA's broad definition of disability is appropriate, because "only those individuals who are both handicapped *and* otherwise qualified are eligible for relief." 480 U.S. at 285 (emphasis in original).

> In the context of employment discrimination, the thrust of [the Act's] purpose is essentially to protect individuals who have an underlying medical condition or other limiting impairment, but who *are* in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures, and with or without a reasonable accommodation by the employer.

Arnold v. United Parcel Service, Inc., 136 F.3d 854, 861 (1st Cir. 1998) (emphasis in original). In other words, it is those disabled individuals who are receiving stabilizing treatment who are more likely to be "qualified" for employment, and fall squarely among the groups protected by the Act. Accordingly, the *Arnold* court concluded that "Arnold's diabetes makes him just the type of person the ADA was designed to protect. . . . [W]ith treatment, he can perform the job despite his impairment if UPS will reasonably accommodate him." *Id.* at 862; *see also Pritchard v. Southern Co. Services*, 92 F.3d 1130, 1134

(11th Cir. 1996), *amend. on rhg. in part by* 102 F.3d 1118 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 2453 (U.S. 1997) ("[I]t is possible that both are true: she still suffered from these symptoms and they limited major life activities, but she was able to control them sufficiently with the help of medication to perform at work . . . .").

On the floor of the Senate, sponsor Senator Harkin reiterated the focus on whether an individual is qualified. Rather than making an individual "nondisabled" and unprotected, medication promotes protection by enabling an individual to meet standands.

> [If the disability] would affect the performance of that person's job . . . then the employer could say this person was not qualified. If, however, the disability in question, whether schizophrenia, manic-depressive or whatever it might be is, let us say, controlled by drugs, the person is under a doctor's care, and the person is qualified for the job, . . . the employee then would be able to go to the EEOC and file a complaint . . .

135 Cong Rec S 10765, *S10766 (Sept. 7, 1989). Senator Domenici made precisely the same point:

> [T]here may have been a time in history when if you had diabetes somebody asked you, do you have diabetes and they could have said to you, we cannot hire you. Certainly that is not the case today. Certaintly you can have a disease as grave as that and fit more jobs. You are either in the process of being maintained, or we are coming close to finding a cure, or your disability is sporadic.

Id. at *S10779 (emphasis added).

Under the analysis adopted below, many individuals with treatable and episodic disabilities who are qualified inevitably find themselves unprotected by the Act. This result must be rejected as incompatible with the broad scope and purposes of the Act.

B. Excluding Individuals with Treatable Disabilities Overlooks the Real Need for Workplace Accommodations to Maintain Health.

Individuals with diabetes, seizure disorders, mental health disabilities, symptomatic or asymptomatic HIV, cancer, hepatitis, and other conditions often require workplace accommodations to maintain their health:

> Qualified handicapped employees who can perform all job functions may require reasonable accommodation to allow them to . . . pursue therapy or treatment for their handicaps. . . . In some instances, this may require employers to alter existing policies or procedures that they would not change for non-handicapped employees, but that is the essence of reasonable accommodation.

Buckingham v. United States, 998 F.2d 735, 740-41 (9th Cir. 1993) (citations and internal quotations omitted) (upholding transfer to obtain medical treatment). While individuals with these conditions may not be currently experiencing significant symptoms, *see Bragdon v. Abbott*, 118 S. Ct. 2196, accommodations are often needed to prevent a more active phase of their disability. Without consistent monitoring and treatment, many disabled individuals will experience a worsening of their conditions.

For example, many disabled persons require periodic visits to doctors and other health care providers.

Because most health care providers operate during business hours only, scheduling accommodations are required.[28] Similarly, some disabilities are exacerbated by working a night or split shift.[29] Assuming no undue hardship, a shift adjustment may be a reasonable accommodation.

Further, many disabled individuals with treated disabilities rely on breaks to take medications or to otherwise monitor their conditions.[30] Such breaks can enable individuals with asymptomatic HIV and other conditions to comply with complicated treatment and medication regimens, thereby maintaining health and gainful employment. Excluding individuals with mitigated disabilities would impede these results.

C. Excluding Individuals Who Mitigate Their Symptoms with Medications and Other Measures Falsely Presumes a "Complete Cure."

Excluding individuals who alleviate their symptoms with medications and other mitigating measures falsely

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[28] The EEOC has recognized that time off for doctor's appointments, breaks for monitoring medications, and shift adjustments may be reasonable accommodations. EEOC, Technical Assistance Manual (TAM), Sec. 3.10(3), p. III-22 to III-23 (Jan. 1992); *EEOC Enforcement Guidance on Psychiatric Disabilities* 24-25; *see also* 42 U.S.C. § 12111(9)(B) ("modified schedule" as accommodation).

[29] *See Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996), (summary judgment denied where clerk sought transfer after night shift aggravated depression); H.R. Rep. No. 485(II) at 62-63; S. Rep. No. 116 at 31.

[30] *See Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 856 (1st Cir. 1998) (successful control of diabetes required ongoing monitoring of glucose levels, and two to four insulin injections daily); *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (N.D. Ill. 1998) (diabetic's request for greater access to bathroom for urination and insulin injections created triable issue of fact).

presumes a "complete cure" that is simply absent. Many individuals who rely on mitigating measures continue to experience limitations, albeit lessened, that require accommodations.[31] Further, many individuals who control their symptoms must closely monitor their conditions in ways that nondisabled people do not. Many will periodically experience difficulties with their medications triggering active symptomology and necessitating accommodations. *See Harris v. H & W Contracting, Co.*, 102 F.3d 516 (11th Cir. 1997) (change in medication caused panic attack and eight-day hospitalization for individual with Graves Disease ordinarily stabilized with medication).

Moreover, individuals undergoing treatments or taking medications for various conditions may experience side effects such as nausea or grogginess.[32] These side effects themselves may require accommodation. *EEOC Enforcement Guidance on Psychiatric Disabilities*, p. 31, question 31, example B; *see also Guice-Mills v. Derwinski*, 967 F.2d 794, 797 (2nd Cir. 1992) (finding nurse with depression disabled, and noting side effects of medication requiring accommodation); *Overton v. Reilly*, 977 F.2d 1190, 1195 (7th Cir. 1992) (noting side effects of medication requiring accommodation); *Fehr v. McLean Packaging Corp.*, 860 F. Supp. 198, 200 (E.D. Penn. 1994) (job modification sought for medication side effects).

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[31] Goodwin, Frederik K. and Jamison, Kay Redfield, *Manic Depressive Illness* 597 (1990); Fisher, R.S., *et al.*, "A Large Community-Based Survey of Quality of Life and Concerns of People With Epilepsy: Part 1," 39:6 *Epilepsia* (1998).

[32] Lickey, Marvin E. and Gordon, *Medicine and Mental Illness* 129 (1991).

D. Excluding Individuals with Treatable Disabilities Would Lead to Irrational and Pernicious Results.

A statute should not be construed to mandate irrational or pernicious results. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Under the rules adopted below, an individual who relied upon an accommodation to obtain ongoing medical treatment for a disability, and thereby successful controlled his or her symptoms, would then lose the right to accommodation and be forced to discontinue treatment until the symptoms once again became active. *See Bragdon,* 118 S. Ct. at 2213-14 (Ginsburg, J., concurring) ("No rational legislator, it seems to me apparent, would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."). Ultimately, unemployment could result, in direct contravention of the statute's purposes.

Further, the reasoning adopted below would foster a perverse disincentive to maintaining health and controlling symptoms through measures such as medicine, diet, rest, and monitoring. *See Arnold,* 136 F.3d at 863 n.7 (Arnold "should not be denied the protections of the ADA because he has independently taken the initiative and successfully brought his diabetes under control.").

VII. THE CONCERNS OF EMPLOYERS ARE AMPLY REPRESENTED.

Giving a broad interpretation to the definition of disability does not undermine the concerns and interests of employers, which are amply protected through other provisions of the Act. For example, an individual who is not "qualified . . . with or without accommodation" for the job, or who poses a "direct threat," is not protected under

Title I of the ADA. 42 U.S.C. §§ 12111(8), 12112(a), 12113(b). Similarly, if the required accommodation would impose an "undue hardship," the employer may not be held liable. 42 U.S.C. §§ 12112(b)(5)(A), 12111(10).

That individuals are considered in their unmitigated states does not automatically mean that they are "substantially limited" in a major life activity, creating "per se" disabilities. An individual must still show that without mitigation one or more major life activity is substantially limited "in comparison to most people." S. Rep. No. 116 at 23; H.R. Rep. No. 485(II) at 52; *see also id.*("A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort."); 29 C.F.R. Pt. 1630, App., § 1630.2(j) ("[A]n impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population."). Thus, an individual who wears glasses for myopia must show that his or her visual impairment is substantially limiting compared to most people: in light of the prevalence of mild near-sightedness, an individual with low myopia is unlikely to meet this standard.

VIII. INDIVIDUAL WHO ARE DENIED EMPLOYMENT OPPORTUNITIES ON THE BASIS OF A DISABILITY ARE REGARDED AS HAVING A DISABILITY.

The definition of disability under the ADA includes multiple "prongs" designed to ensure that all individuals who experience discrimination on the basis of disability --

including those individuals with no present limitations -- are protected. Thus, in addition to protecting individuals with substantially limiting impairments, the Act protects individuals with a "record of" disability,[33] and individuals who are "regarded as" having a disability.

Although there is no reason that an individual cannot be covered under more than one "prong,"[34] the statute's structure suggests a sequential analysis as a practical matter: "An individual who satisfies this first part of the definition of the term 'disability' is not required to demonstrate thate he or she satisfies either of the other parts of the definition. However, if an individual is unable to satisfy this part of the definition, he or she may be able to satisfy one of the other parts of the definition." 29 C.F.R. Pt. 1630, App., § 1630.2(j).

Under the third prong of the ADA's definition of disability, a person is disabled if he or she is "regarded as" having an impairment that is substantially limiting. 42 U.S.C. § 12102(2)(C). The provision is essential to those

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[33] *See, e.g., Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1382 (3d Cir. 1991) ("A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute.").

[34] *See Arnold*, 136 F.3d at 862 ("There is no reason this employee could not be protected under two prongs simultaneously."); Brief of the EEOC, *Graham v. Connie's Inc.*, No. 98-35242 (9th Cir.) (filed July 15, 1998), p. 17 ("Nothing in the statute suggests that the three prongs of the definition are mutually exclusive. . . . [T]he individual might qualify under both the "actual" and "regarded as" prongs of the definition, since the impairment may be substantially limiting in fact and perceived as such by the employer.").

who are not in fact substantially limited, but who face limitations imposed by the unfounded stereotypes of others.

In *Arline*, the Court interpreted identical language found in Section 504, stating:

> By includ[ing] not only those who are actually physically impaired, but also those who are regarded as impaired . . . Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284. The Court reasoned that Congress intended to protect individuals from decisions based on stereotypes and assumptions about a particular condition, rather than objective, reasoned assessments. *Id.* at 284-85.

In enacting the ADA, Congress adopted Section 504's "regarded as" language, as well as this Court's interpretation of the provision. Indeed, a thorough analysis of *Arline* is included in all three major committee reports:

> The [*Arline*] Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. . . . The Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

H.R. Rep. No. 485(II) at 53; H.R. Rep. No. 485 (III) at 30; S. Rep. No. 116 at 23.

Accordingly, an individual rejected from a particular job because an x-ray indicates abnormalities is "regarded as" disabled, even if the person has no outward symptoms. H.R. Rep. No. 485 (III) at 31; S. Rep. No. 116 at 24. Similarly, the "regarded as" prong protects individuals with controlled diabetes and epilepsy who are denied jobs as a "result of negative attitudes and misinformation." S. Rep. No. 116 at 24.[35] Also falling within the third prong are "people who are rejected for a particular job solely because they wear hearing aids. . . ." *Id.*

Thus, under the *Arline* standard adopted by Congress in enacting the ADA, an employer that bases its employment decision on a person's actual or perceived physical or mental impairment -- whether substantially limiting or not -- regards the individual as disabled:

> A person who is . . . discriminated against [ ] because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability.

H.R. Rep. No. 485(II) at 53; S. Rep. No. 116 at 24. Further, such disability-based decisions are unlawful when they are not rationally related to the individual's ability to perform

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[35] Although Congress intended that treatable conditions be evaluated without mitigating measures as "first prong" disabilities, it conceived that such conditions also fit within the third prong. Further, those conditions that are *not* substantially limiting, even in the absence of mitigation, might be "regarded" by others as disabilities.

the job. *See Arline*, 480 U.S. at 285; H.R. Rep. No. 485 (III) at 30-31.

Any other rule would be contrary to the Act's purposes. That is, if the ADA did *not* cover individuals whose disqualification rested on their physical or mental conditions, such individuals "would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were 'otherwise qualified.' Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent." *Arline*, 430 U.S. at 285.

In *Sutton v. United Airlines*, 130 F.3d 893 (10th Cir. 1997), the plaintiffs presented evidence that United Air Lines disqualified them from all pilot positions because of its perception that they were unable to perform the job with their physical impairment of myopia.[36] Based on this impairment, and with no objective or reasoned assessment of actual ability to safely perform, United concluded that the applicants were unsuitable for employment as pilots. This conclusion is contrary to federal disability law, which requires employers to "replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *See Arline*, 480 U.S. at 284-85.

Instead of evaluating United's reaction, the Tenth Circuit held that the plaintiffs "must show that the employer regarded [them] as being substantially limited in performing either a class of jobs or a broad range of jobs in

[36] Although United now asks the Court to examine the women's impairments as ameliorated by corrective lenses, under its own policy United considered these impairments in their uncorrected state, a stance that indeed emphasizes the need for "third prong" protection.

various classes." 130 F.3d at 904. Because the plaintiffs could not show disqualification from a "class of jobs," the court concluded that they were not regarded as disabled. *Id.*

Nothing in *Arline* or the ADA's legislative history suggests this narrow reading. The *Arline* Court explained that a person could be limited in working if rejected because of a particular employer's perceptions about the impairment. 480 U.S. at 283. There was no requirement that other employers would have also discriminated. In fact, the ADA's legislative history specifies precisely the opposite. *See* H.R. No. 485(III) at 30 (third prong applies "whether or not the employer's perception was shared by others in the field"). Indeed, the Tenth Circuit's analysis improperly rewards employers whose qualification standards are the *most* arbitrary.

The district court in *Murphy v. U.P.S.*, 946 F. Supp. 872 (D. Kan. 1996), *aff'd*, 141 F.3d 1185 (10th Cir. 1998), also failed to engage in the analysis dictated by *Arline* and the Congress. In accepting UPS's assertion that it did not regard the plaintiff as disabled, but as "not certifiable under DOT regulations,"[37] the court incorrectly confused the question of disability with whether Mr. Murphy was qualified for the job.[38] In so doing, the court disregarded evidence that Mr. Murphy was fired because UPS falsely

[37] In seeking a review of Mr. Murphy's DOT status and thereupon firing him without objective evidence that his impairment imposed a safety risk, UPS adopted DOT's own questionable rationale.

[38] The legitimacy of an employer's purported reliance on a safety regulation must be evaluated separately from the question of an actual or perceived disability. *Arline*, 480 U.S. at 285-86.

regarded him as having a condition that would prevent him from driving safely.[39]

CONCLUSION

In light of the fundamental purposes of the ADA, the express intent of Congress, and the body of case law decided both before and after the ADA's enactment, the Court should reverse and remand the decisions in *Sutton* and *Murphy* for an analysis of whether the plaintiffs' impairments, in the absence of mitigating measures, constitute protected disabilities.

Further, pursuant to the Court's decision in *Arline*, this Court should reverse the Tenth Circuit's conclusion that plaintiffs Sutton and Murphy were not "regarded as" disabled by the employers that rejected them.

Respectfully submitted,

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[39] Mr. Murphy passed a physical, received a DOT Health Card, and drove UPS vehicles without incident; however, he was fired once UPS received his blood pressure results. 946 F. Supp. at 875-76.

APPENDIX

APPENDIX

AIDS Action is the national voice on AIDS, representing 3,200 of America's leading AIDS organizations and the millions of Americans affected by HIV/AIDS they serve. AIDS Action fights the AIDS epidemic by working for public policy that prevents new HIV infections, provides care for people living with HIV and AIDS, defends their rights and searches aggressively for a cure. The organization educates policy makers, corporate leaders, the national media and the public and provides leadership and support to communities affected by HIV/AIDS. As the leading AIDS policy organization, AIDS Action maintains the strongest and most effective presence on Capitol Hill on issues affecting our members and constituents.

Since 1983, the AIDS Legal Referral Panel ("ALRP") has advocated on behalf of the rights of people living with HIV and AIDS. Through its staff and panel of volunteer attorneys, ALRP has assisted in over 30,000 legal matters, helping people with HIV/AIDS to maintain healthcare, shelter, income, autonomy and freedom from discrimination. In addition, ALRP represents the interests of people with HIV/AIDS and HIV-affected communities in national public policy discussions. Throughout the history of the AIDS epidemic, ALRP's clients have included individuals who work full or part time. Some have been asymptomatic. Many more have experienced physical symptoms but have been able to work due to the ameliorative effects of complex HIV drug regimens. It is imperative for people living with HIV/AIDS who are able to work to be protected against invidious discrimination and to be given all the opportunities to succeed that are afforded to individuals who are not facing life-threatening illness on a daily basis.

AIDS Legal Services ("ALS") was founded in 1988 as a program of the non-profit, Santa Clara County Bar Association Law Foundation. ALS provides legal services to low-income individuals living with HIV or AIDS in Santa Clara County, California. The mission of ALS is to secure justice and the protection of human rights through the development, delivery, and sponsorship of specialized legal services. ALS provides representation in, among others, the areas of access to services, employment and housing. Since its inception, ALS has assisted over 2,000 individuals living with HIV or AIDS.

AIDS National Interfaith Network ("ANIN") is an organization of HIV/AIDS ministries and faith communities that mobilizes people and institutions for education, advocacy and support of persons affected by HIV/AIDS. As people of faith and action, the members of ANIN affirm the inherent worth and dignity of all persons without prejudicial regard to race, gender, age, health/physical status, sexual orientation, religious commitment, relationship status, or legal/social standing. ANIN strives to assure that all those affected by HIV/AIDS will receive compassionate care, support and assistance. HIV/AIDS is not a divine punishment. Merciful and empowering love extends to all people affected by disease, including HIV/AIDS.

The Arc of the United States ("The Arc") is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation. Together, more than 1,100 state and local chapters of The Arc work to ensure that people with mental retardation can realize the opportunity to live, learn, work and play in their communities. Since its inception, The Arc has vigorously challenged attitudes and public policy based on false stereotypes that have authorized or encouraged segregation of people with mental retardation

in virtually all areas of life. The Arc was one of the leaders in framing and supporting passage of the Americans with Disabilities Act. Many people with mental retardation also have other conditions which can be ameliorated or treated through the use of medications or other measures.

The Center for Women Policy Studies is a national non-profit, multi-ethnic and multicultural feminist policy research and advocacy institution founded in 1972. In 1987 the Center founded the National Resource Center on Women and AIDS Policy and has been a leader in addressing critical AIDS policy issues from women's diverse perspectives. The Resource Center has produced more than thirty research, advocacy and policy reports since its inception, including an analysis of the Social Security Administration rules for determining eligibility for HIV-related disability in women. The Center's Metro DC Collaborative for Women with HIV/AIDS project works directly with low income women living with HIV who will be directly impacted by the ruling in this case.

The Center for Law in the Public Interest is a private, non-profit public interest law firm whose clients include individuals with disabilities, as well as groups that advocate on behalf of individuals with disabilities. In order to further the interests of these individuals, the Center engages in education, advocacy and litigation involving the Americans with Disabilities Act. The Center is active in advancing and protecting the interests of individuals with disabilities in local communities and on the state and federal levels. The issues presented by the instant cases will have significant impact on the individuals on whose behalf the Center advocates.

Disability Rights Advocates ("DRA") is a non-profit public interest law firm that specializes in class action civil

rights litigation on behalf of persons with disabilities throughout the United States. With offices in California and Hungary, DRA strives to protect the civil and human rights of people with disabilities throughout the world. DRA works to end discrimination in areas such as access to public accommodations, employment, transportation, education, and housing. In conjunction with the Disability Statistics Center at the University of California, San Francisco, DRA has published a report entitled, "Disability Watch: A Status Report on the Condition of People with Disabilities in the United States."

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The Center's interest in the legal rights of those with disabilities is longstanding. The ELC has represented and continues to represent clients faced with discrimination on the basis on their disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

The Epilepsy Foundation of America is a non-profit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. Together with its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates up-to-date, accurate information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. The term "epilepsy" evokes

stereotyped images and fears that affect persons with this medical condition in all aspects of life, especially employment. Since its inception, the Epilepsy Foundation of America has stood against the stigma and estrangement associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears. The Foundation is also concerned that determinations of whether a person is disabled be made without regard to mitigating measures, such as anti-epileptic medications. People whose seizures are controlled by medication are not guaranteed that their seizures will stay under control. In addition, people who achieve sustained control of their seizures must face the fact that their employers still regard them as being disabled on a daily basis.

Gay and Lesbian Medical Association ("GLMA") is an organization of 2,000 lesbian, gay, bisexual and transgender physicians, medical students and their supporters. GLMA works to maximize the quality of health care and health services for lesbian, gay, bisexual and transgender people, to promote full civil rights and to foster a professional climate in which its diverse members can achieve their full potential.

Gay Men's Health Crisis ("GMHC") is the nation's oldest and largest AIDS service and advocacy organization. GMHC serves thousands of men, women and children living with HIV/AIDS; educates the public about HIV prevention and treatment; and fights for fair and effective AIDS policy at all levels of government. The Legal Services and Advocacy Department at GMHC represents HIV-positive clients who seek protection from discrimination within the meaning of the Americans with Disabilities Act ("ADA"). As new treatments show great promise for extended health and longevity, more and more people living with HIV/AIDS

place long-range importance on the ability to obtain and retain employment, with all of its financial and psychological benefits. Many people living with HIV/AIDS need accommodations to permit them to adhere to the treatment regimens that keep them healthy enough to continue to work. Additionally, symptoms incident to the very mitigating measures that enable them to work often create the need for the ADA's protection in the first instance.

The Human Rights Campaign ("HRC") is the nation's largest lesbian and gay civil rights organization. HRC is devoted to fighting and ending discrimination against gay men and lesbians and to protecting the basic civil and human rights of those Americans. HRC is also specifically devoted to fighting discrimination against people living with HIV and AIDS. To these ends, HRC has provided federal advocacy and media and grassroots support on a range of legislative initiatives affecting gay men, lesbians, and people living with HIV/AIDS, including the Americans with Disabilities Act and the Employment Non-Discrimination Act.

The Judge David L. Bazelon Center for Mental Health Law is a national legal advocacy organization which seeks to eradicate discrimination against people with mental disabilities in housing, employment and other services. The Center has advocated on behalf of many clients who have alleviated the symptoms of their conditions through therapy and medication; however, they may require periodic accommodations to their conditions which are often episodic in nature.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national non-profit public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation,

education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns; in 1983, Lambda filed the nation's first AIDS discrimination case. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV and other disabilities, including, in part, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998); *Doe & Smith v. Mutual of Omaha Insurance Co.*, 1998 WL 166856 (N.D. Ill. April 3, 1998); *School Bd. for Nassau Cty. v. Arline*, 107 S. Ct. 1123 (1987); *Chalk v. United States District Court*, 814 F.2d 701 (9th Cir. 1988); and *Raytheon v. Fair Emp. & Hous. Comm'n*, 212 Cal. App. 3d 1242 (1989). Lambda is particularly familiar with the unique barriers confronting persons with HIV and other stigmatized disabilities who attempt to secure fair treatment in the workplace.

The National Latina/o Lesbian, Gay, Bisexual and Transgender Organization ("LLEGÓ") is a national non-profit organization at the forefront of the Latina/o Lesbian, Gay, Bisexual and Transgender ("LGBT") community organizing for access to health, community development and political resources. Many of LLEGÓ's members are affected by HIV/AIDS, asymptomatic and otherwise. LLEGÓ maintains strong roots in the Latina/o LGBT communities across the United States, Puerto Rico and Latin America. More than 180 organizations and institutions comprise LLEGÓ's Network of Organizations, representing the diverse backgrounds of the Latina/o LGBT community. LLEGÓ has a proud legacy of eleven years of organizing and advocacy for individual and community empowerment.

Mental Health Advocacy Project ("MHAP") is a 20-year-old program of the Santa Clara County Bar Association Law Foundation, a California non-profit organization. MHAP's mission is to empower people affected by

psychiatric or developmental disabilities or labeled as having such disabilities to live more independent, secure and satisfying lives through the enforcement of their legal rights and the advancement of their social and economic well-being. To this end, MHAP helps over 4,000 clients per year resolve their legal problems in the areas of care and treatment, education, employment, housing, consumer rights and financial entitlements. MHAP regularly assists clients with securing vital reasonable accommodations and has first-hand knowledge about the effectiveness of reasonable accommodations in creating greater employment and housing opportunities for all individuals with disabilities.

The National Alliance for the Mentally Ill ("NAMI") is the nation's leading grassroots advocacy organization solely dedicated to improving the lives of persons with severe mental illnesses. NAMI has more than 185,000 members and 1,200 state and local affiliates in all fifty states, the District of Columbia, Puerto Rico and Canada. NAMI's efforts focus on support to persons with severe mental illnesses and their families; advocacy for nondiscriminatory and equitable federal, state, and private-sector policies; research into the causes, symptoms and treatments for brain disorders; and education to eliminate the pervasive stigma toward severe mental illnesses.

The National Association of Protection and Advocacy Systems ("NAPAS"), which was founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy for Individual Rights Program, 29 U.S.C. § 794e, to provide legal representation and related advocacy services on behalf

of all persons with disabilities. In fiscal year 1997 alone, P&As served well over 700,000 people with disabilities through a variety of mechanisms: individual case representation, systemic advocacy, information and referral and education efforts. NAPAS facilitates the coordination of P&A activities, provides P&As with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government.

The National Center for Law and Learning Disabilities, Inc. ("NCLLD") is a non-profit corporation that seeks to promote understanding of learning disabilities ("LD"), attention deficit disorder ("ADD") and related conditions; knowledge of applicable laws; and development of appropriate policies. To achieve these goals, NCLLD provides education, advocacy, legal analysis and policy recommendations on issues affecting persons with LD/ADD. NCLLD supports the position that disability status should be determined without regard to the beneficial effects of medication, since often medication does not achieve a measurable, complete and permanent correction of the condition.

The National Center for Lesbian Rights ("NCLR"), formerly the Lesbian Rights Project, is a non-profit public interest law firm, founded in 1977 and devoted to the legal concerns and civil rights of all lesbian, gay, bisexual and transgendered persons, including those with disabilities.

The National Depressive and Manic-Depressive Association ("National DMDA") is the nation's largest patient-run, illness-specific organization. Founded in 1986 and headquartered in Chicago, Illinois, National DMDA has a worldwide, grassroots network of 275 chapters and support groups. It is guided by a 65-member Scientific Advisory

Board composed of the leading researchers and clinicians in the field of depressive illnesses.

The National Health Law Program ("NHeLP") is a national public interest firm that seeks to improve health care for America's working and unemployed poor, minorities, elderly and people with disabilities. NHeLP serves legal services programs, protection and advocacy offices, community-based organizations, the private bar, providers, and individuals who work to maintain a health care safety net for the millions of uninsured or underinsured low income people. NHeLP monitors Medicare, Medicaid and other publicly-funded health care programs; seeks remedies when laws and policies are ignored; and helps Americans receive needed medical care.

New York Lawyers for the Public Interest, Inc. ("NYLPI") is a non-profit public interest law office that works to protect the rights of people with disabilities. Through its Disability Law Center, NYLPI seeks to protect and promote the civil rights and liberties of people with disabilities and to enable them to participate fully in the mainstream of American life. NYLPI has been active on issues involving the application of the Americans with Disabilities Act ("ADA") to discrimination in employment, government services, and public accommodation. NYLPI represents individuals and files *amicus curiae* briefs on its own behalf and on behalf of disability and civil rights groups in cases around the country addressing the application of the ADA.

RESOLVE, the National Infertility Association, was founded in 1974 as a non-profit consumer organization. RESOLVE's mission is to provide timely, compassionate support and information to individuals who are experiencing infertility and to increase awareness of infertility issues

through advocacy and public education. RESOLVE's national office and its more than fifty chapters throughout the United States provide help to thousands of people experiencing the infertility crisis.

The World Institute on Disability is a private, non-profit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.